

STATE OF MICHIGAN
COURT OF APPEALS

KIM A. HIGGS,

Plaintiff-Appellant,

v

KIMBERLY HOUSTON-PHILPOT and DELTA
COLLEGE BOARD OF TRUSTEES,

Defendants-Appellees.

UNPUBLISHED

April 17, 2012

No. 302767

Bay Circuit Court

LC No. 10-003559-CZ

Before: FORT HOOD, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff appeals as of right an order denying his motion for summary disposition and granting defendants' motion for summary disposition in this declaratory judgment action. We affirm.

Plaintiff is a member of the Delta College Board of Trustees and is an attorney. He filed this lawsuit against the Delta College Board of Trustees, as well as a co-trustee, alleging, in relevant part, a violation of the Open Meetings Act (OMA) because he was interrupted while speaking during the public comment segment of a public budget meeting. He claimed that, although he was a member of that public body, he had the right to speak as a member of the general public during the public comment segment of the meeting. Plaintiff further alleged that he was entitled to the due process protections afforded by the Michigan Constitution, Art 1, § 17, with regard to an investigation initiated by the Delta College Board of Trustees that was based on its conflict of interest policy. Plaintiff claimed that he would not receive a fair and impartial hearing from his co-trustees in light of his filing of, and involvement in, several lawsuits against Delta College and/or the Delta College Board of Trustees. Eventually plaintiff filed a motion for summary disposition under MCR 2.116(C)(10) with regard to these claims.

Defendants responded to plaintiff's motion and also moved for summary disposition under MCR 2.116(C)(8) and (C)(10). Defendants argued that the OMA was not violated because plaintiff was permitted to speak during the public comment segment of the subject meeting and he completed his comments as evidenced by the transcript of that meeting. Defendants also argued that plaintiff was not entitled to the protections set forth in Art 1, § 17 of the Michigan Constitution with regard to the conflict of interest investigation. Defendants asserted that

plaintiff did not allege any infringement on his constitutional rights to life, liberty, or property as a consequence of the conflict of interest policy; thus, the due process clause was not applicable.

Following oral arguments on the cross-motions for summary disposition, the trial court rendered its written opinion and order granting defendants' motion and denying plaintiff's motion. The trial court held that the OMA was not violated because plaintiff was allowed to speak during the public comment segment of the budget meeting. Thus, the claim was without merit and was dismissed. The court further held that plaintiff's right to due process was not violated by the conflict of interest policy because a constitutionally protected interest was not at stake. Accordingly, plaintiff's case was dismissed in its entirety. This appeal followed.

First, plaintiff argues that the trial court erroneously concluded that MCL 15.263(5) of the OMA was not violated because he was denied his right to speak during the public comment segment of the subject budget meeting. After de novo review of the court's decision on this motion for summary disposition, and considering whether a genuine issue of material fact existed, we disagree. See MCR 2.116(C)(10); *Coblentz v City of Novi*, 475 Mich 558, 567-568; 719 NW2d 73 (2006).

Plaintiff claims that he had the right to speak during the public comment segment of the budget meeting and that right was denied because he was interrupted during the course of his comments. Pursuant to MCL 15.263(5) of the OMA, "[a] person shall be permitted to address a meeting of a public body under rules established and recorded by the public body." Here, it is clear from the transcript of the hearing that plaintiff did, in fact, address the Delta College Board of Trustees during the public comment segment of the meeting and was not prevented from making and completing his comments. Thus, we agree with the trial court that the OMA was not violated and summary disposition of this claim was proper.

Plaintiff also argues that the trial court abused its discretion when it failed to enter a declaratory judgment in his favor with regard to his right to speak during the public comment segment of future Delta College Board of Trustees' budget hearings. We disagree.

The trial court did not grant or deny plaintiff's request for a declaratory judgment apparently because plaintiff's asserted right was not violated; thus, the trial court did not exercise its discretion with regard to this issue. As defendants argue in their brief on appeal, an actual controversy must exist to invoke declaratory relief. See MCR 2.605. An actual controversy does not exist where the injury sought to be prevented is hypothetical. *Shavers v Attorney General*, 402 Mich 554, 589; 267 NW2d 72 (1978). Here, plaintiff's claim is based on his speculation as to how the Delta College Board of Trustees will act in the future. In the absence of an actual controversy, the trial court lacked subject-matter jurisdiction to enter a declaratory judgment. See *McGill v Auto Ass'n of MI*, 207 Mich App 402, 407; 526 NW2d 12 (1994).

Further, although plaintiff has asserted that he has the legal right to address the "public body" during the public comment segment of its meetings—just as members of the general public may address the public body—he fails to provide persuasive rationale to support this claimed right. Plaintiff was a member of the public body that he wished to address as "a member of the general public." That fact distinguishes this case from all of the cases plaintiff cites in

support of his argument; in fact, he has failed to cite a single factually similar case and we could not find one.

The purpose of the OMA “is to promote governmental accountability by facilitating public access to official decision making, and to provide a means through which the general public may better understand issues and decisions of public concern.” *Manning v City of East Tawas*, 234 Mich App 244, 250; 593 NW2d 649 (1999). Stated another way, “[t]he primary purpose of the OMA is to ensure that public entities conduct all their decision-making activities in open meetings and not simply hold open meetings where they rubber-stamp decisions that were previously made behind closed doors.” *Schmiedicke v Clare School Board*, 228 Mich App 259, 264; 577 NW2d 706 (1998). We fail to see how the purpose of the OMA is achieved when individual members of the public body are permitted to present their personal disagreements about the decision-making of the public body to which they are a member during the public comment segment of the meeting. Every member of a public body is also a member of the general public. We do not believe that MCL 15.263(5) was intended to provide such a forum or to promote such objectives. And, here, there was a particular time set forth in the agenda that permitted members of the Delta College Board of Trustees to speak. There was also a procedure in place by which a member of the Delta College Board of Trustees could attempt to have an issue added to the agenda; however, plaintiff apparently did not utilize these options. In any case, we have significant reservations as to whether MCL 15.263(5) entitled plaintiff to address the “public body” in which he was a member during the public comment segment of a meeting, but we need not decide this issue here because plaintiff was permitted to make his comments.

Next, plaintiff argues that the trial court erroneously concluded that he was not entitled to the due process protections afforded by Art 1, § 17 of the Michigan Constitution with regard to defendants’ investigation of his alleged violation of the Delta College conflict of interest policy. After de novo review of this constitutional issue and the court’s decision on this motion for summary disposition, we disagree. See *Coblentz*, 475 Mich at 567-568; *Kampf v Kampf*, 237 Mich App 377, 381; 603 NW2d 295 (1999).

The Michigan Constitution guarantees that persons may not be deprived of life, liberty, or property without due process of law. Const 1963, art 1, § 17; *Hanlon v Civil Service Comm*, 253 Mich App 710, 722; 660 NW2d 74 (2002). “Procedural due process limits actions by the government and requires it to institute safeguards in proceedings that affect those rights protected by due process, such as life, liberty, or property.” *Kampf*, 237 Mich App at 382 (citations omitted). Thus, a threshold requirement to a procedural due process claim is the demonstration that the plaintiff has a liberty or property interest protected by the Constitution. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 209; 761 NW2d 293 (2008) (citation omitted). A protected property interest exists where an individual has a legitimate claim of entitlement deriving from existing rules or understandings that stem from an independent source such as state law; a unilateral expectation to the claimed interest is insufficient. *Williams v Hofley Mfg Co*, 430 Mich 603, 610; 424 NW2d 278 (1988); *Mettler Walloon*, 281 Mich App at 209.

Here, plaintiff appears to claim that defendants’ investigation of his alleged violation of the Delta College conflict of interest policy constituted state action which entitled him to procedural due process protections because his position as a member of the Delta College Board

of Trustees constituted a protected property interest. However, plaintiff has failed to establish that his membership on the Delta College Board of Trustees constituted a protected property interest. That is, plaintiff has not directed us to an independent source, such as state law, that created such a property interest. The law in Michigan is well-settled that persons holding public office do not have a property right in that position.

A public office cannot be called ‘property,’ within the meaning of these constitutional provisions (United States Constitution, Fifth Amendment - due process, and Fourteenth Amendment - equal protection of law). If it could be, it would follow that every public officer, no matter how insignificant the office, would have a vested right to hold his office until the expiration of the term. Public offices are created for the purposes of government. They are delegations of portions of the sovereign power for the welfare of the public. [*Detroit v Division 26 of Amalgamated Ass’n of Street, Electric R & Motor Coach Employees of America*, 332 Mich 237, 251; 51 NW2d 228 (1952), quoting *Attorney General v Jochim*, 99 Mich 358, 367; 58 NW 611 (1894).]

Michigan law is consistent with federal law in this regard.¹ The United States Supreme Court has explained that “public offices are mere agencies or trusts, and not property as such” and that “the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right.” *Taylor v Beckham*, 178 US 548, 577; 20 S Ct 890; 44 L Ed 1187 (1900); see, also, *Snowden v Hughes*, 321 US 1, 7; 64 S Ct 397; 88 L Ed 497 (1944) (reaffirming the holding of *Taylor*). Thus, plaintiff’s claim that his membership on the Delta College Board of Trustees constitutes a protected property interest is without merit.

Plaintiff also appears to argue that even if he did not have a protected property interest we should hold that he was entitled to a “fair and impartial hearing” with regard to the subject investigation. Plaintiff confusingly claims that the trial court erred in “confining [its] analysis to simply constitutional considerations” and refers us to the “common law” as providing support for his asserted right. However, the cases relied upon by plaintiff involve either constitutional due process claims or are inapposite. For example, plaintiff relies on *Tumey v State of Ohio*, 273 US 510; 47 S Ct 437; 71 L Ed 749 (1927), but the issue in that case was whether the accused was denied his constitutional right to due process. Plaintiff relies on *Peninsular R Co v Howard*, 20 Mich 18 (1870), but that case involved a property condemnation proceeding that violated due process rights. Plaintiff also refers us to *People v Overysse Twp Board*, 11 Mich 222 (1863), but that case involved self-dealing in violation of fiduciary duties, which is not at issue here. Plaintiff also cites to *Crampton v Michigan Dep’t of State*, 395 Mich 347; 235 NW2d 352 (1975), but that case involved a driver’s license revocation proceeding that violated due process rights. Plaintiff further cites to *Spratt v Dep’t of Social Services*, 169 Mich App 693; 426 NW2d

¹ The Michigan Constitution does not provide greater protection than the federal due process guarantee; thus, federal precedent may aid our analysis. *English v BCBSM*, 263 Mich App 449, 459; 688 NW2d 523 (2004).

780 (1988), but that case involved the denial of a welfare claim in violation of due process rights. And plaintiff relies on *Vayiar v Vic Tanny Int'l*, 114 Mich App 388; 319 NW2d 338 (1982), but that case involved the denial of due process rights with regard to workers' compensation benefits. Accordingly, plaintiff's assertion that this "common law" supports his position is without merit.

Plaintiff also argues that he should be entitled to hearing procedures like those set forth in the Administrative Procedures Act, MCL 24.201 *et seq.*, as well as for claimed violations of the Standards of Conduct for Public Officers and Employees, MCL 15.341 *et seq.* However, the Delta College Board of Trustees is not an administrative "agency" as defined by MCL 24.203(2), and plaintiff is not a "public officer" as defined by MCL 15.341(c). Thus, the hearing procedures set forth in these statutory provisions simply do not apply under the circumstances presented in this case and provide no support for his claim.

In summary, plaintiff has failed to establish that his membership on the Delta College Board of Trustees constituted a protected property interest entitling him to the due process protections provided by Art 1, § 17 of the Michigan Constitution with regard to defendants' investigation of his alleged violation of the Delta College conflict of interest policy.

Affirmed. Defendants are entitled to costs as prevailing parties. See MCR 7.219(A).

/s/ Karen M. Fort Hood

/s/ Mark J. Cavanagh

/s/ Kirsten Frank Kelly